Supreme Court, U.S.
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No. 00-176

In The

Supreme Court of the United States

OTT F. APPEL, III, PHYLLIS FULLER, ROBERT STEVENS, STEVE STUGIL and WALTER HICKMAN, JR.,

Petitioners,

v.

GABE CANARY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals properly determined that legislative immunity did not apply to Petitioners' employment decision not to renew Respondent's administrative contract?

REASONS FOR DENYING THE WRIT

The decision of the Sixth Circuit is consistent with this Court's opinion in *Bogan v. Scott-Harriss*, 523 U.S. 44 (1998). The Sixth Circuit carefully reviewed the factual background of this case and correctly distinguished it from *Bogan*. Unlike *Bogan*, this case involved an employment decision not to renew the administrative contract of an assistant principal. The entire class of jobs was not eliminated and there was no prospective or far-reaching effect on anyone except the respondent, Mr. Canary. The Sixth Circuit's opinion does not depart from settled principles. There is not a conflict among the circuits that needs to be resolved.

In addition, this is not a case of great public importance. Petitioners speculate about a chilling effect on the willingness of citizens to serve on school boards. Yet, the Sixth Circuit's opinion is in accord with prior decisions limiting the application of legislative immunity to legislative functions. School Board members engaging in true legislative activity retain immunity. Further, school board members who make personnel decisions still retain the qualified immunity defense available to them under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny.

1. The Sixth Circuit's Opinion Is Consistent With This Court's Decision In *Bogan v. Scott-Harriss*

Petitioners assert they are entitled to legislative immunity and that the decision of the Sixth Circuit conflicts with this Court's decision in *Bogan v. Scott-Harriss*, 523 U.S. 44 (1998). In *Bogan*, the Court held that local

legislators have absolute immunity for legitimate legislative activity. As the Sixth Circuit found, this case presents a situation very different from that which the Court reviewed in *Bogan*.

First, the Sixth Circuit correctly determined that, unlike what happened in *Bogan*, the decision to nonrenew Respondent's contract was simply an administrative employment decision. As observed by the Sixth Circuit, the minutes of the Board meeting reflect that these decisions were made under the heading "personnel actions". *Canary v. Osborn, et al.*, 211 F.3d 324, 330 (6th Cir. 2000). The decision was made in executive session to "discuss the employment of public employees." *Id.* at 326. The Sixth Circuit properly found that Board was making personalized assessments of individual employees rather than an impersonal budgetary analysis of various positions. *Id.* at 330.

Second, the Sixth Circuit appropriately noted that, unlike *Bogan*, the decision at issue did not "involve the termination of a position." *Id.* at 330. In *Bogan*, there was a vote to eliminate the Department of Human Services. Scott-Harriss, the employee who headed the department, was terminated. The decision had far-reaching and prospective application that went beyond her termination. *Bogan*, 523 U.S. at 55-56. Human services were no longer provided to city residents.

Our case is easily distinguishable. Petitioners did not vote on a legislative proposal to eliminate all assistant principal positions. They simply agreed not to renew Respondent's assistant principal contract. Rather than implicating the budgetary priorities of the school district

and the services it provides to its residents, the decision not to offer Respondent a contract amounted solely to the "firing of a particular employee." *Bogan*, 523 U.S. at 55-56. This was an administrative employment decision, not a legislative act.

While Petitioners assert that there were no assistant principals by the beginning of the 1994-1995 school year, there is no evidence in the record of any legislative action by them to accomplish that result. Instead, as the Sixth Circuit recognized, Petitioners' March 10, 1994 vote did not eliminate all assistant principals. In fact, two assistant principals were awarded new assistant principal contracts for the 1994-1995 school year. *Canary*, supra, at 330-31. The only assistant principal affected by the vote was Respondent. *Id.*

Finally, unlike *Bogan* where the employee was not replaced and there was no argument that she was, the Sixth Circuit recognized that Respondent's duties were arguably assumed by another employee under a different title in a newly created position. *Id.* An employment decision was made to give another employee the new position instead of Respondent. That decision had no effect on the public at large or the services provided by the Board or School District. There was no legislative activity. Under Ohio law, a job is not abolished when the appointing authority simply transfers that job's duties to a new employee and gives the job a new title. *In re Appeal of Woods*, 7 Ohio App. 3d 226, 228 (1982).

2. The Sixth Circuit's Opinion Will Have Neither A Chilling Effect On Individuals Nor A Debilitating Effect On School Districts

Petitioners argue that the decision of the Sixth Circuit will discourage citizens from becoming school board members. Not so.

The decision of the Sixth Circuit did not change the law. Legislators remain immune from suit for true legislative activity. School board members who engage in legitimate legislative activity retain absolute legislative immunity. Petitioners did not legislate. They went into a private and closed executive session to discuss personnel matters and employment decisions.

In addition, Petitioners fail to recognize that even without legislative immunity, individuals remain protected by qualified immunity for decisions that do not violate clearly established constitutional rights. See *Harlow v. Fitgerald*, 457 U.S. 800 (1982).

CONCLUSION

The mere fact that Petitioners voted to approve a recommendation denying Respondent an assistant principal contract does not make their conduct legislative. *Bogan* does not hold that legislative immunity attaches to individual employment decisions. *Bogan* limits legislative immunity to legitimate legislative activity. As the Sixth Circuit correctly determined, there was none in this case.

The petition for certiorari should be denied.

Respectfully submitted,

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